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Night at the Museum: The Value of Cultural Property and Resolving the Moral and Legal Problems of the Illicit International Art Trade

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I. INTRODUCTION

Modern nations have always defined the extent of their domain through the display of the artifacts and treasures of the cultures and peoples they have conquered.¹ The nature of the modern western museum has long since been characterized as the national forum for these conquests of cultural wealth.² Nations and empires seem to symbolically derive power through the physical confiscation of cultural objects.³

In the past century, and in the more recent context of globalization, private endeavors driven by economic gain have plagued the art world with scandals of illicit exportation of stolen art. In 2005, a Los Angeles Times article exposed the Getty Museum's acquisition of artifacts stolen from Italy.⁴ After years of investigations, negotiations, and civil and criminal charges, the Getty reached an agreement with the Italian government for the

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1. See generally Willard L. Boyd, *Museums as Centers of Cultural Understanding*, in *IMPERIALISM, ART AND RESTITUTION* (John Henry Merryman ed., 2006).

2. *Id.*

3. *Id.*

4. Jason Felch & Ralph Frammolino, *Getty Had Signs It Was Acquiring Possibly Looted Art, Documents Show*, L.A. TIMES, Sept. 25, 2005, at A1 [hereinafter Felch, *Getty Had Signs*].

return of forty works of art.⁵ In return, the Italian government agreed to extend loans of other objects of similar value to compensate for the Getty's loss.⁶ This settlement agreement follows in the footsteps of an earlier agreement made between the Italian government and the Metropolitan Museum in New York.⁷

Even as this comment was being written, federal agents raided four Southern California museums after conducting a four-year-long undercover investigation. A Los Angeles art dealer had allegedly been smuggling illegal artifacts from Southeast Asia into the United States and donating them to museums using fraudulent appraisals for inflated tax deductions.⁸ Not only will the criminal liability of the dealer require courts to revisit recently decided and controversial case law surrounding legislation discussed further in this article, but the role of the museums in accepting donations will also be scrutinized.

U.S. courts have faced questions involving illegally imported artifacts and the prosecutions of collectors and museum officials under the National Stolen Property Act (NSPA).⁹ While the application of this body of legislature has often been unclear and controversial, any criminal liability on the part of the art dealer found in this most recent case should be less troublesome due to the intentional nature of the scheme. The more prominent question surrounds the treatment of the American museums and the fate of the objects themselves. The recent Getty settlement presents the art world with an example of the potentially amicable results available through open negotiations, as well as the preferred course of action under international agreements¹⁰ and to museum officials worldwide.¹¹

5. Jason Felch and Ralph Frammolino, *Getty to Give 40 Antiquities Back to Italy*, L.A. TIMES, Aug. 2, 2007, at A1 [hereinafter Felch, *Getty to Give 40 Antiquities*].

6. *Id.*

7. See Daniel Williams, *Met to Return Looted Artworks to Italy*, WASH. POST, Feb. 22, 2006, at C01.

8. See generally Edward Wyatt, *Four Museums are Raided in Looted Antiquities Case*, N.Y. TIMES, Jan. 25, 2008, at 14.

9. National Stolen Property Act (NSPA), 18 U.S.C. § 2315 (1948).

10. See UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 10 I.L.M. 289, 823 U.N.T.S. 231, available at <http://unesdoc.unesco.org/images/0011/001140/114046e.pdf#page=130> [hereinafter Convention on Cultural Property]; see also UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330, available at

This comment will explain the advantages of enforcing the international agreements which have been created to protect the art market from illicit trading of stolen artifacts. Section II will describe the details of the most recent and, perhaps, most extensive and far-reaching instance of illicitly traded cultural objects, uncovered when federal agents raided four Southern California museums.¹² Section III will discuss the background of the illegal black market trade of stolen and looted art from foreign countries, and the current legal and scholarly trends involving the property rights of ancient artifacts, the interests and principles which guide our understanding of the laws and circumstances, and the liability of U.S. museums. Section IV will analyze the available alternatives created by international agreements, the foreign and domestic legislation that have risen out of such agreements, and the effectiveness and interplay of the many laws and conventions which act together in our understanding of the international art trade. Finally, section V will discuss the importance of self-regulation within the museum community, alternative solutions in supplementing the international conventions in existence, the conformity of the Getty settlement with recent changes in policy, and in light of the recent investigations, the effectiveness of the settlement and other policies in curbing the illicit trade of stolen antiquities.

This comment will attempt to rectify the concerns of cultural patrimony with the realities of vast museum collections within market nations. If a full scale repatriation of all cultural objects is not a valid solution (meaning the return of all Ban Chiang materials and any other illegally exported objects to their country of origin), then what compromise would both satisfy the competing interests and suppress the illicit activities of grave robbers and looters? This recent case is decidedly different from the stolen objects discovered at the Getty a few years earlier, and will change the way American museums look at cultural objects and patrimony. While the Ban Chiang objects are worth significantly less than the Italian pieces found in the Getty

<http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>.

11. See ASSOCIATION OF ART MUSEUM DIRECTORS, ART MUSEUMS AND THE INTERNATIONAL EXCHANGE OF CULTURAL ARTIFACTS (Oct. 2001), *available at* http://www.aamd.org/papers/documents/CulturalProperty_000.pdf.

12. Wyatt, *supra* note 8, at 14.

collection, there is a far greater amount scattered through many museums across the United States. An individualized settlement between source nation and museum which obligates the return of the objects after an extended loan will likely prove to be impractical if not impossible. What is good for the goose may not be good for the gander. This comment will show, however, that the basic tenants and philosophical underpinnings of the Getty Settlement could prove to be an adequate basis for an overarching scheme for the subsequent treatment of illicitly traded cultural objects firmly rooted in international agreements and moral standards within the museum community.

II. LOOTED ARTIFACTS, TAX SCHEMES, AND MUSEUM RAIDS

A. *The Story*

On January 24, 2008, federal agents raided four Southern California museums armed with search warrants and affidavits describing a network of theft and fraud uncovered through four years of undercover joint investigation conducted by three different agencies.¹³ The affidavit of the undercover agent reads like a cheap novelette or television drama. The story introduces readers unfamiliar with the art trade to the owners of the Silk Roads Gallery, Jonathan and Cari Markell, and Robert Olson, who allegedly smuggled looted antiquities out of Thailand, Myanmar, and China.¹⁴

In 2003, after intercepting a cargo shipment of looted artifacts, an undercover agent for the National Parks Services posed as an art collector.¹⁵ He contacted the Markells in order to seek their assistance in donating certain artifacts to local museums.¹⁶ According to the officer's affidavit, the Markells would purchase from various Asian countries, looted artifacts that had been illegally exported despite laws established in those regions that regulated the removal of any cultural objects after a certain

13. See generally Wyatt, *supra* note 8, at 14; Jason Felch, *Raids Suggest a Deeper Network of Looted Art*, L.A. TIMES, Jan. 25, 2008, at A1 [hereinafter Felch, *Raids Suggest a Deeper Network*].

14. Search Warrant on Written Affidavit, *United States v. Los Angeles County Museum of Art*, No. 08-0100M (C.D. Cal.) (filed Jan. 19, 2008), available at <http://www.latimes.com/media/acrobat/2008-01/34915593.pdf> [hereinafter LACMA Search Warrant].

15. *Id.*

16. *Id.*

date.¹⁷ The objects were often painted over and affixed with “Made in Thailand” stickers to make them appear like modern replicas.¹⁸ Once the Markells obtained the objects, they sold them to clients and then fraudulently appraised the artifacts at inflated values.¹⁹ The inflated appraisals were always made at just below \$5,000.²⁰ According to statements made by Jonathan Markell to the undercover agent, this was the price that would trigger suspicion by the Internal Revenue Service.²¹ The Markells then assisted the clients in donating the objects to local museums in order to receive the inflated tax deduction.²²

The artifacts in question originated in Thailand from a culture known as “Ban Chiang.” The Ban Chiang lived in Northeast Thailand from roughly 1,000 B.C. until about A.D. 200.²³ The first Ban Chiang antiquities were discovered in 1957.²⁴ The location of this discovery has since been named a World Heritage Site and is considered the most important prehistoric settlement yet discovered in Southeast Asia.²⁵

The Los Angeles County Museum of Art (“LACMA”), the Bowers Museum in Santa Ana, the Pacific Asia Museum (“PAM”) in Pasadena, and the Mingei International Museum in San Diego all contain Ban Chiang material. Either the Markells themselves, their relatives, or their clients donated many of these artifacts.²⁶ All four of these locations were the subjects of the search warrants resulting from the investigation. According to his affidavit, the undercover agent approached the Markells about getting their assistance in donating the artifacts to local museums.²⁷ The affidavit documents meetings with museum officials and statements made by both the Markells and various museum personnel regarding the status of the objects. The affidavit

17. *Id.*

18. *Id.* at 26.

19. *Id.* at 11-19.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 11.

24. Ban Chiang Archaeological Site - World Heritage Site, ¶ 31 <http://www.worldheritagesite.org/sites/banchiang.html> (last visited Jan. 3, 2009).

24. LACMA Search Warrant, *supra* note 14, at 17, ¶ 31.

25. *Id.*

26. *Id.*

27. *Id.* at 11, ¶¶ 18(b), 19.

describes a meeting with the senior curator and several other staff members at the Pacific Asia Museum where

[o]ne museum staff member asked the UCA [undercover agent] where he had found one of the pieces and if he had dug it up himself. Another staff member stated that if the UCA had dug up the piece, he could get the museum in trouble. [Markell] replied that it was not an earth-shattering piece that the government was going to get crazy over.²⁸

In the case of the Bowers Museum and the Pacific Asia Museum, the warrants clearly suggest that officials were aware that the objects were looted and overvalued but accepted them anyway. One museum official from the Bowers Museum would justify accepting the objects because "he could not determine" what rules the museum was supposed to follow.²⁹ At the Pacific Asia Museum, the museum's deputy director allegedly told the agent she was "expected to at least put up token resistance to accepting antiquities without proper paperwork."³⁰ As for LACMA and the Mingei, the warrants are unclear about the extent to which museum officials knew of the alleged schemes.³¹ But in another conversation between the undercover agent and the Markells regarding museum donations, the agent's affidavit states that Jonathan Markell reconsidered donating a particular piece to LACMA because they "were sticklers for having good provenance."³² On the morning of January 24, 2008, all four of the Southern California museums listed above were raided by federal agents. The raids were intended to obtain the museum records, therefore none of the artifacts were seized and no arrests were made.³³

28. *Id.* at 13, ¶ 22.

29. Search Warrant on Written Affidavit, *United States v. Charles W. Bowers Museum*, No. 08-0093 at 19, ¶ 33(l) (C.D. Cal.) (filed Jan. 19, 2008), available at <http://www.latimes.com/media/acrobat/2008-01/34915384.pdf>.

30. Search Warrant on Written Affidavit, *United States v. Pacific Asia Museum*, No. 08-0118M, at 13, ¶ 31(a) (C.D. Cal.) (filed Jan. 22, 2008), available at <http://www.latimes.com/media/acrobat/2008-01/34915680.pdf>.

31. LACMA Search Warrant, *supra* note 14.

32. *Id.* at 19, ¶ 37 (The term "provenance" refers to the history of the item, including proof of the legality of its acquisition).

33. See generally *id.* at 32-37; Felch, *Raids Suggest a Deeper Network*, *supra* note 13.

B. Alleged Violations and Legal Implications

The search warrant alleges numerous statutory violations, citing the Archeological Resources Protection Act ("ARPA"), the National Stolen Property Act ("NSPA"), the California Penal Code, Thailand's Act on Ancient Monuments, Antiques, Objects of Art and National Monuments ("The Thai Act"), and the Law of the People's Republic of China on the Protection of Cultural Relics ("The Chinese Act"). The Thai Act, passed in 1961, and The Chinese Act, passed in 1982, both state that antiques and relics that are buried, concealed or abandoned are state property, and any removal of these objects of art and antiquity from their country of origin is a crime.³⁴ These types of foreign "patrimony statutes" will be discussed in greater length throughout the course of this comment, as well as the U.S. state and federal statutes which work to effectively give some teeth to the foreign property laws which would otherwise go unrecognized in the United States.

The search warrants detail numerous conversations between the undercover agent and the Markells regarding the source of the objects and the means by which they were obtained.³⁵ The allegations also seem to imply either knowledge or complicit behavior of the museums involved.³⁶ These claims can be easily inferred by the nature of the Ban Chiang objects. The Thai Act was passed in 1961, and Ban Chiang material was not excavated until well after that date. Practically all Ban Chiang material in the United States could be considered stolen under American Law.³⁷

III. THE INTERNATIONAL ART TRADE

A. Defining Principles Concerning the International Exchange of Cultural Property

The importance of cultural property can be seen in the scholarly definitions surrounding the term as well as the everyday meaning we attach to it as members of a nation, a culture, and mankind in general. Cultural property has been defined as "the

34. LACMA Search Warrant, *supra* note 14, at 21.

35. LACMA Search Warrant, *supra* note 14, at 20-26.

36. See generally *id.*; Felch, *Raids Suggest a Deeper Network*, *supra* note 13; Edward Wyatt, *Museum Workers Are Called Complicit*, N.Y. TIMES, Jan. 26, 2008, at 17 [hereinafter Wyatt, *Museum Workers Are Called*].

37. Jori Finkel, *Thai Antiquities, Resting Uneasily*, N.Y. TIMES, Feb. 17, 2008, at Arts, 29.

tangible and intangible effects of an individual or group of people that define their existence, and place them temporally and geographically in relation to their belief systems and their familial and political groups, providing meaning to their lives.”³⁸ The objects and the meanings attached to those objects become definitions of the cultures themselves. In fact, the International Conference on Cultural Property Rights of the United Nations called it “ethnocide” to withhold or destroy cultural property.³⁹ The importance of these objects and their meaning is hardly doubted. Along with the definition of the property, it is also important to understand the terms given to the different nations involved in the scheme. “Source” nations are those from which cultural objects enter the international art trade and “market” nations are those to which such objects travel.⁴⁰ The objects themselves occupy an interesting role since many source nations that are rich in cultural objects have small, fragile economies. While their economic policies encourage export to produce economic growth, exportation of cultural objects is typically regulated and prohibited to prevent the exportation of the nation’s cultural heritage or patrimony.⁴¹ When discussing the international art trade, the uncertainty lies in which principles surrounding the protection of cultural property should be favored over the others?

In any dialogue about the international exchange of cultural property, there are three competing points of view. The first view, typically held by source nations, is one which emphasizes the important relation between the cultural objects and national history. This is often referred to as “cultural nationalism.”⁴² The arguments surrounding this type of international policy uses language which seeks to “protect” the “national cultural heritage” or “national cultural patrimony.” This view claims that cultural objects belong to the nation from which they were created and

38. SHERRY HUTT ET AL., *CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES* xi (American Bar Association 2004).

39. *Id.*

40. JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS, AND THE VISUAL ARTS* 113 n.1 (5th ed. 2005).

41. *Id.*

42. John Henry Merryman, *A Licit International Trade in Cultural Objects*, in *THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART, AND THE LAW* 186 (Kluwer Law International, 2000) [hereinafter Merryman, *A Licit International Trade in Cultural Objects*].

implies validity to the earlier definition of cultural property that attributes a national character to the objects themselves.⁴³ Furthermore, this view demands the repatriation of these objects. The most famous example of such a view came from the pleas of Melinda Mercouri, the Greek Minister of Culture, for the return of the Elgin Marbles from the British Museum. Her argument was direct and simple: the marbles belong in Greece because they are Greek.⁴⁴ She stated:

"This is our history, this is our soul. . . . You must understand us. You must love us. We have fought with you in the second [world] war. Give them back and we will be proud of you. Give them back and they will be in good hands."⁴⁵

And

"[T]hey are the symbol and the blood and the soul of the Greek people. . . . [W]e have fought and died for the Parthenon and the Acropolis. . . . [W]hen we are born, they talk to us about all this great history that makes Greekness. . . . [T]his is the most beautiful, the most impressive, the most monumental building in all Europe and one of the seven miracles of the world."⁴⁶

From these arguments, it is hard to resist the strong emotional appeals which are made to protect the interests of the source nation. In fact, as this paper will soon discuss, this view predominates most contemporary discussions of the treatment of international art law by favoring retention and return of cultural objects.

A second view is one typically held by market nations known as the "internationalist image."⁴⁷ This view de-emphasizes cultural nationalism and the return/recovery of cultural objects to source nations. It supports humanity's common interest in its past. This theme is frequently illustrated in the quoted words of the 1954 Hague Convention, cultural property is "the cultural heritage of all

43. JOHN HENRY MERRYMAN, INTRODUCTION TO IMPERIALISM, ART AND RESTITUTION, 3-4, 10-11 (John Henry Merryman ed., Cambridge University Press) (2006) [hereinafter MERRYMAN, INTRODUCTION TO IMPERIALISM, ART AND RESTITUTION].

44. John Henry Merryman, *Thinking About the Elgin Marbles*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART, AND THE LAW 24, 24 (Kluwer Law International, 2000) [hereinafter Merryman, *Thinking About the Elgin Marbles*].

45. *Mercouri Pleads – 'Return Our Marbles'*, S.F. CHRON., May 26, 1983, at 26.

46. R.W. Apple Jr., *Q & A: Melina Mercouri*, N.Y. TIMES, Mar. 4, 1984, at E9.

47. Merryman, *A Licit International Trade in Cultural Objects*, *supra* note 42, at 177-78.

mankind”⁴⁸ as well as in the 1970 UNESCO Convention which emphasizes the “interchange of cultural property among nations for scientific, cultural, and educational purposes” in order to inspire “mutual respect and appreciation among nations.”⁴⁹ Under this view, individual nations’ decisions concerning ownership which significantly impair this common interest should not be enforced by other nations.⁵⁰

The third view is propagated by archeologists and ethnographers who put primary concern on the objects and their contexts. The “object/context” view condemns any actions which impair the value derived from the object’s study and encourage national and international measures in order to restrict illicit acquisitions of artifacts which destroy the sites and contexts in which they are found.⁵¹ Proponents of this view often blame museums, collectors and the antiquities trade for providing a market which encourages the violation of these sites in source nations.⁵²

B. Types of National Laws Concerning the Exportation of Cultural Goods

The types of law adopted by different nations vary in detail and change as national policies adapt to economic growth.⁵³ National export laws usually fall into five general categories. (1) Blanket nationalization is found in a growing number of source nations and declares broad classes of objects (even those in undiscovered and undeveloped archeological sites) as property of the Nation or the People.⁵⁴ (2) Embargos are total prohibitions on export. This was the stance of many source nations before the

48. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, 240.

49. Convention on Cultural Property, *supra* note 10, at preamble. These words are often underscored in dialogues led by source nations and cultural nationalists since they clearly support the retentionism ideals of free flowing cultural property and seem to divert attention from what they see as the Convention’s main purpose: the recovery of cultural property to source nations.

50. MERRYMAN ET AL., *supra* note 40, at 113-14.

51. *Id.* at 114.

52. *Id.*

53. UNESCO, THE PROTECTION OF CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS (1984); LYNDAL V. PROTT & PATRICK J. O’KEEFE, UNESCO, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (1988).

54. MERRYMAN ET AL., *supra* note 40, at 115.

move to blanket nationalization after World War II. These schemes usually include a right of the state to purchase the objects before they are exported.⁵⁵ (3) Restricted permit schemes, like that in place in Italy and a number of other source nations, put total prohibition on the export of listed works considered to be of great importance and require an export permit for other works. While a permit is theoretically possible, the process is burdensome and a permit is rarely granted.⁵⁶ (4) Liberal permit laws exist in Canada, Japan, and Great Britain in which export permits are required for a broad list of works and are routinely granted.⁵⁷ These schemes also contain provisions that allow permits to be temporarily withheld for a small number of works to allow local institutions to acquire the work within a specified time. If none attempt to acquire the work, the permit is granted.⁵⁸ Finally, (5) free export exists in Switzerland and the United States. While no restrictions exist in the United States on the export of works of art, there are restrictions on the import of works into the United States of works which have been illegally exported from the source nation which will be discussed later.⁵⁹

C. The Dangerous Effects of the Illicit Art Trade

The looting of cultural objects occurs in two contexts. The first involves the seizure of property during times of war and colonial occupation. The majority of collections found in the world's great museums can be traced to looting during times of war and colonization such as the Napoleonic occupation of Egypt and Britain's colonial period in India.⁶⁰ The second context involves clandestine excavation for commercial gain. In recent years, the looting, plunder, illicit excavation and smuggling of artifacts from artifact-rich nations by individuals for their personal collections, or to sell to artifact hungry collectors and museums has increased significantly.⁶¹ The majority of private collections are

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (1983).

60. John Allen Cohen, *An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural Property*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 5 (2004).

61. *Id.*

likely comprised of antiquities without documentation or export permits.⁶²

More recently, the acquisition of artifacts through illicit excavation and smuggling into the United States has been linked to some of the world's wealthiest art institutions, including the Metropolitan Museum in New York (The Met) and the Getty Museum in Los Angeles.⁶³ These discoveries have led to a movement towards the repatriation of stolen cultural property.⁶⁴ The discovery of looted artifacts from Italy in both the Met and the Getty has resulted in settlement agreements involving the return of several important works.⁶⁵ This movement has met with some opposition from market nations.⁶⁶ These nations and their museums have argued that the return of stolen works to their rightful owner should be abrogated due to the passage of time. Furthermore, other values, such as the compelling interest to share the work and its significance with the world, outweigh the interests of the nation of origin.⁶⁷

These objections have been met by arguments from source nations and other commentators addressing further concerns created by the black market sale of illicit cultural objects. Foremost are the dangers these trades pose to the cultural heritage of the countries of origin, especially when the object is of particular cultural importance.⁶⁸ Another major concern is the destruction of the sites and objects themselves. The destruction of the sites and objects are not only damaging to the cultural heritage of the source nation, but also to the value of all nations through the destruction of potential knowledge that is lost.

D. Types of Theft and the Protected Interests Under Exportation Laws

It is important to first distinguish between simple theft and illegal export. Consider two examples: A painting is stolen from a German museum and smuggled into the United States where it is sold to an American collector. This is a case of simple theft and it

62. *Id.*

63. *Id.*

64. *Id.*

65. See Felch, *Getty to Give 40 Antiquities*, *supra* note 5.

66. Cohen, *supra* note 60, at 6.

67. *Id.*

68. *Id.* at 7.

is understandable that the court will require the return of the painting to the German owners since no title of ownership is transferred through theft.⁶⁹ Next, consider a French painting which is removed from France to the United States by its owner without an export permit, where he sells it to an American collector. Here, the charge is not theft since transfer of title took place when the owner sold the painting on his own. The violation is that of a foreign exportation law, which courts will routinely refuse to enforce.⁷⁰

Along with the issues of nationalism and internationalism in the context of the exchange of cultural property, other interests are also important when considering the treatment and restitution of stolen art. Protection as an interest in source nations can include both the protection of state patrimony and protection of the objects themselves.⁷¹ This aspect of cultural property law can weaken source nation arguments for retention and repatriation of objects as will be discussed later in this paper when responding to the possible solutions and courses of action to be taken in response to the problems of stolen art.

When objects are illegally stolen it is clear that the objects should be returned to the source nation. Issues of legality should play a role in our understanding of the treatment of cultural objects when the art was taken at a time when the looting did not violate international law.⁷²

A principle which is more easily recognized and understood is the issue of morality. Most would easily agree that the removal of cultural objects through either aggression or opportunism, while maybe not illegal, is certainly deplorable by modern standards of morality and has been criticized throughout history during periods of imperialism when such looting took place.⁷³ It is also reasonable to judge the moral quality of an action by the moral standards applicable at the time and place of the action.⁷⁴ Herein lies the

69. *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982).

70. *King of Italy v. De Medici Tornaquinci*, 34 T.L.R 623 (1918); *Attorney-General of New Zealand v. Oritz*, [1983] 2 W.L.R. 809.

71. MERRYMAN ET AL., *supra* note 40, at 113.

72. MERRYMAN, INTRODUCTION TO IMPERIALISM, ART AND RESTITUTION, *supra* note 43, at 11.

73. *Id.* at 12 ("Napoleon's Italian art-looting campaign aroused objections in Europe, even among French intellectuals. Lord Elgin's removal of sculptures from the Acropolis was famously and effectively decried by Byron in his poetry and correspondence.").

74. *Id.*

difficulty, determining the moral standards to which these actions should be held.

There is, of course, a third type of case which creates further issues and is of particular importance in our discussions of Ban Chiang material and the Getty case. Consider a nation which has adopted a blanket nationalization law which declares certain objects to be property of the state. A dealer purchases such an object, smuggles it out of the country, and sells it to an American collector. The source nation would most likely prefer that this type of case be treated the same as the simple theft cases, and has been the source of controversy surrounding a body of U.S. court decisions concerning the National Stolen Property Act.

E. Museum Liability Under the NSPA

The National Stolen Property Act was passed by Congress to create civil and criminal liability for those who have stolen the property in one state and have transported the property to another state in order to escape the laws of the original state.⁷⁵ The common law understanding of the NSPA has found that this law also applies to property stolen in foreign countries that is subsequently brought into the United States.⁷⁶ Unlike the exportation laws discussed above, the NSPA has stirred up controversy among U.S. museums and collectors by establishing the existence of a crime as soon as the object is stolen under foreign property law, rather than once the illegally exported object is imported into the country. In the earliest successful prosecution of a U.S. art dealer under the NSPA, *United States v. Hollinshead* held that proof of knowledge of a country of origin's ownership is not necessary,⁷⁷ and additionally sets a broad definition of "stolen."⁷⁸ According to the court in *Hollinshead*, "knowledge . . . is relevant only to the extent that it bears upon the issue of their knowledge that the [object] was stolen."⁷⁹

The *McClain* cases state that the prosecution for stealing from a foreign nation under that nation's laws nationalizing its cultural

75. 18 U.S.C. § 2315.

76. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

77. *Id.* at 1156.

78. *United States v. Turley*, 352 U.S. 407, 417 (1957) ("We conclude that [the NSPA] requires an interpretation of 'stolen' which does not limit it to situations which at common law would be considered larceny.").

79. *Hollinshead*, 495 F.2d at 1156.

property is allowed under the NSPA.⁸⁰ *McClain* involved art collectors from the United States who had looted several artifacts from Mexico despite a blanket patrimony law which made all pre-Columbian artifacts found within its borders property of the state. The doctrine establishes limitations of criminal liability under the NSPA: the nation of origin must declare ownership of the cultural property of which the defendants have deprived them (distinguishing the actions from mere violations of exporting restrictions)⁸¹ and the exported artifact must be considered “stolen” according to the standards stated in the NSPA.⁸²

In *United States v. Schultz*, the second circuit revived the *McClain* doctrine over thirty years later by upholding a conviction of an art dealer under the NSPA and Egyptian law despite defendant’s claims that the art was not “stolen” in any sense under U.S. law.⁸³ The court held that the artifacts were owned under Egyptian law, and were therefore considered “stolen” under the NSPA.⁸⁴ The art world scrutinized the decision in *Schultz*,⁸⁵ and showed disagreement with the application, effectiveness, and necessity of the law. Furthermore, the appellate decision puts the burden on the foreign government to show that it enforces its own property statute at home. According to some legal analysts comparing this decision with the recent facts surrounding the Markells investigation, this requirement will make it very difficult to make any legal predictions regarding the future developments of that case.⁸⁶

80. *United States v. McClain* (*McClain I*) 545 F.2d 988, 994 (5th Cir. 1977) (“The Republic of Mexico, when stolen property has moved across the Mexican border, is in a similar position to any state of the United States in which a theft occurs and the property is moved across state boundaries.”).

81. *Id.* at 1000-01.

82. *Id.*

83. *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003).

84. *Id.* at 410 (explaining that “our courts are capable of evaluating foreign patrimony laws to determine whether their language and enforcement indicate that they are intended to assert true ownership of certain property, or merely restrict the export of that property.”).

85. Christine L. Greene, Comment, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 33, 44 (2007).

86. Finkel, *supra* note 37.

F. An Important Comparison: The Elgin Marbles

Between 1801 and 1812, the British Ambassador Lord Elgin removed approximately 247 feet of the three-foot-high horizontal frieze carved in low relief extending around the Parthenon's main inner chamber.⁸⁷ He returned the marbles to England and sold them to the British Museum, where they are now displayed and known as "The Elgin Marbles."⁸⁸ Lord Elgin also collected portions of the frieze, metopes, and pediments.⁸⁹ These were integral parts of the Parthenon's structure and their removal lead to substantial damage to the adjoining masonry.⁹⁰ As observed in the passionate pleas of the Greek cultural minister above, the Elgin Marbles represent an important paradigm for issues of imperialism, art, and restitution.⁹¹ Lord Elgin's removal of the marbles continues to create controversy in the international art and serves as a clear example of one of the two contexts discussed above. The marbles were not looted during a time of war or armed conflict. Their removal is an example of what may be called opportunism.⁹² Furthermore, their removal would not be considered theft since there is no true owner of the property title. Any discussion of the restitution of cultural property requires an application of the standards and rules to the circumstances surrounding the Elgin Marbles. The outcome of the Getty scandals and the appropriate use of valued principles may implicate their future treatment.

IV. INTERNATIONAL CONVENTIONS

A. The UNESCO Convention

In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property considered it "incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and

87. Merryman, *Thinking about the Elgin Marbles*, *supra* note 44, at 24.

88. *Id.*

89. *Id.*

90. William St. Clair, *Imperialism Appropriations of the Parthenon*, in *IMPERIALISM, ART AND RESTITUTION* 65, 74 (John Henry Merryman ed., 2006).

91. *Id.* at 65.

92. MERRYMAN, INTRODUCTION TO IMPERIALISM, ART AND RESTITUTION, *supra* note 43.

illicit export.”⁹³ The Convention calls upon State Parties to undertake appropriate measures to protect cultural property of other nations by imposing law and penalties against those who violate the prohibition of illicit importation of stolen art.⁹⁴ The Convention also calls for the restitution of the objects to be made, provided the country of origin has made just compensations to any bona fide purchasers.⁹⁵

The important results of the UNESCO Convention are the subsequent laws and directives passed by the ratifying nations. In 1983, the United States passed the Cultural Property Implementation Act in conformity with the UNESCO Convention as a means of implementing these measures and more narrowly defining the prohibited acts and illicit acquisitions of stolen art.⁹⁶ In conformity with the Convention, the United States extended agreements with the governments of other member states to assist in the return of specifically classified archeological objects.⁹⁷

In 1993, the Council of Europe passed a directive on the return of cultural objects unlawfully removed from the territory of a member state providing to its members a system for the amicable return of cultural objects.⁹⁸ However, neither the EC directive nor the U.S. agreements mentioned above are meant to provide any protection of the archeological sites or cultural heritage of the nation of origin.⁹⁹ Reports on the directive have found that administrative cooperation and the exchange of information among member states poses the greatest shortcoming in the mechanism set forth.¹⁰⁰ The unification of a common procedure among nations has been proposed as a possible solution, but has

93. Convention on Cultural Property, *supra* note 10, at preamble.

94. *Id.* at art. 8.

95. *Id.* at art. 7(b)(ii).

96. 19 U.S.C. § 2601.

97. Media Note, Office of the Spokesman, U.S. Dep't. of State, United States Extends Agreement Protecting Italy's Archeological Materials Representing the Pre-Classical, Classical and Imperial Roman Periods (Jan. 19, 2006), <http://statelists.state.gov/scripts/wa.exe?A2=ind0601c&L=dospress&P=2370> (on file with author).

98. Council Directive 93/7, The Return of Cultural Objects Unlawfully Removed From the Territory of a Member State, 1993 O.J. (L 074) 1 (EC).

99. *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee*, COM (2005) 675 final (Dec. 21, 2005).

100. *Id.*

found little support.¹⁰¹ This trend of unification under a common system can be seen in other international agreements as well.

B. The UNIDROIT Convention

As a result of these shortcomings, UNESCO asked the International Institute for the Unification of Private Law (UNIDROIT) to prepare a more efficient self-executing convention. These efforts resulted in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.¹⁰² While it has yet to be ratified by any market nations, including the United States, this Convention attempts to provide the greatest compromise between source nations and market nations, and between civil and common law countries, by protecting both the rights of the original owners and of the bona fide purchaser.¹⁰³

While some of its components may be considered too ambitious,¹⁰⁴ the UNIDROIT Convention has several important components. First, Article 3 of the Convention requires the possessor of stolen cultural objects to return them.¹⁰⁵ The Convention also limits the time period during which the original owner can bring a claim.¹⁰⁶ The maximum time limit is meant to provide a degree of security to good faith purchasers, and should appeal to western museums.¹⁰⁷ Another appealing feature of the maximum time limit is its flexibility. The Convention allows for an extension of the limitations period in accordance with the nation's own laws when it is beneficial to the claimant.¹⁰⁸ For example,

101. *Id.* ("[S]ome Member States, such as Spain and Germany, would be in favour of setting up a procedure for applying article 4 of the Directive if this helped improve administrative cooperation between Member States without creating more red tape. Denmark, for example, considers it important to set deadlines for replying to requests for cooperation. However, other Member States do not appear to be in favour of a common procedure.").

102. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 10.

103. *See id.*

104. Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. OF TRANSNAT'L L. 1067, 1084 (2005).

105. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 10.

106. *Id.*

107. Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 257-58 (1993).

108. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 10, ch. 2, art. 3(5).

where a thief has concealed a stolen object for fifty years, a United States court could excuse a claimant's delay and extend the limitations period under the doctrine of fraudulent concealment.¹⁰⁹

An additional component of the UNIDROIT Convention is the just compensation of bona fide purchasers who exercise due diligence.¹¹⁰ While the intention of this provision may appeal to nations of civil law, the requirement of due diligence is somewhat vague by requiring purchasers to consult with "any accessible register of stolen cultural objects . . . which it could reasonable have obtained."¹¹¹

The greatest roadblock in early drafts of the UNIDROIT Convention was the inclusion and subsequent removal of an express non-retroactivity clause,¹¹² which caused fears that the Convention would allow any ratifying nation to recover objects stolen prior to the Convention's entry into force for that nation.¹¹³ While source nations favor this policy because it gives them more power to recover objects taken from them in the past, it presents an obvious disincentive for market nations to ratify the Convention. Most market nations are reluctant to put their museums in a position that could potentially deplete their collections of objects recovered through the country's historical conquests centuries earlier. The inclusion of Article 10, which specifies non-retroactivity, solved this problem.¹¹⁴

While the UNIDROIT Convention creates an equitable and comprehensive mechanism for the recovery of stolen cultural objects,¹¹⁵ it is not a perfect balance of interests. Unlike some proponents of the Convention claim, it may not be enough to completely deter the existing problems of art theft, or the dangers facing the integrity of cultural objects.

109. See *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 717 F.Supp. 1374, 1391-92 (S.D. Ind. 1989).

110. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 10.

111. *Id.*

112. Fox, *supra* note 107, at 266.

113. Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, in *THE RECOVERY OF STOLEN ART: COLLECTION OF ESSAYS* 213 (Norman Palmer ed., 1998) [hereinafter Prott, *A Partnership*].

114. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 10, at art. 10 ¶ 1-3 (paragraph 3 makes it clear that the status of prior transactions has not been changed by the adoption of this convention).

115. *Id.*

C. Comparing the Conventions

It should be noted once again that the UNIDROIT Convention was drafted at the request of UNESCO, thirty years after the 1970 Convention in order to complement the earlier rules and adapt to the changes in the international art world. Much had changed within those thirty years, and philosophical concerns surrounding the subject had shifted. This accounts for both the differences in the Conventions themselves, and the likely reasons behind the United States' refusal to ratify the more recent of the two. Both agreements contain exactly the same definitions of cultural objects, however, there is an important difference in how the two Conventions operate. UNESCO is based primarily on a philosophy of government action and requires cultural objects to have been "designated" by the state requesting return.¹¹⁶ The UNIDROIT Convention is dependent on private action.¹¹⁷ Therefore, cultural objects stolen from any type of private or religious collections may be claimed even though the State has neither registered nor designated them.¹¹⁸

Another important difference is the scope of the Conventions. An early insertion by the United States aimed to achieve the success of the UNESCO Convention was Article 7, which limited scope to apply only to the return of designated stolen cultural objects.¹¹⁹ This article was meant to appease nations similar to the United States that were unwilling to create a broad mechanism which would allow for the enforcement of foreign export laws.¹²⁰ While the United States passed legislation which created bans in certain emergency circumstances pursuant to Article 9 of the Convention, it was clear that the United States feared a chilling effect on the entire market if they were required to enforce the laws of foreign states which created complete bans on the export of any cultural objects.¹²¹ By 1995, however, the art world had changed its view as evidenced by the broadened scope of the UNIDROIT Convention. First, many legal developments in several nations had lead to the recognition of foreign public laws.¹²²

116. *Id.*

117. *Id.*

118. Prott, *A Partnership*, *supra* note 113, at 62.

119. Convention on Cultural Property, *supra* note 10, at art. 7(b).

120. Prott, *A Partnership*, *supra* note 113, at 63-4.

121. *Id.*

122. *Id.* at 64.

Second, market nations became increasingly willing to apply total import bans on certain categories of illegally exported goods which caused the most serious evident damage to the cultural heritage.¹²³ The adoption of the European Union directive discussed above made it appropriate to re-examine attitudes towards the enforcement of export controls.¹²⁴ Consequently, the UNIDROIT Convention covers a much broader class of objects than those covered in Article 7 of the UNESCO Convention by clarifying a restricted class of illegally exported objects which will be returned by the source nation.

V. ENFORCEMENT, RESTITUTION, AND ALTERNATIVE SOLUTIONS

The wealthiest art museums in the world will naturally be hesitant to adopt a mechanism that strongly favors restitution and could lead to the return of a large number of cultural artifacts to their respective source nations. Furthermore, the barriers created by such agreements will hinder the important functions of such conventions, primarily the deterrence of theft and consequential destruction of archeological sites and the cultural objects themselves. Analysis of the UNIDROIT Convention, for example, reveals that museums would be more likely to require higher degrees of authenticity and due diligence in order to protect their rights as bona fide purchasers. In other words, one goal of the Convention would be to deter museums from purchasing illicit art through the threat of losing both the work itself along with any right to just compensation. This should be a primary concern of any solution to the art theft problem.

A. Self-Regulation

The simplest solution to the problem may also be the most effective. The heightened scrutiny of current museum policy through daily application should continue in order to diminish the role of looting and the black market in the international art trade. The Association of Art Museum Directors (AAMD) has addressed this issue in its Code of Ethics.¹²⁵ “A museum director should not knowingly acquire or allow to be recommended for

123. *Id.*

124. *Id.*

125. ASSOCIATION OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICES IN ART MUSEUMS: CODE OF ETHICS (2001).

acquisition any object that has been stolen, removed in contravention of treaties or international conventions to which the United States is a signatory, or illegally imported in the United States.”¹²⁶ The AAMD was established to guide and support the contributions of art museums to society.¹²⁷ The AAMD holds its 190 active members to a high level of professional standards and violations of these standards are subject to discipline by reprimand, suspension, or expulsion and may expose that institution to sanctions, such as suspension of loans and shared exhibitions by AAMD members.¹²⁸

The AAMD has published two reports setting out the guidelines that should be followed in regards to the acquisition and loan processes between member museums. In 2004, the AAMD released the Report of the AAMD Task Force on Collecting (“The 2004 Report”), which establishes guidelines and policies for member museums when acquiring works of art.¹²⁹ In 2006, the Report on Incoming Loans of Archeological Material and Ancient Art was released, restating similar guidelines for the processes involved in short- and long-term loan agreements.¹³⁰ The guidelines presented in these reports display a strong concern for balancing the protection and integrity of the objects and archeological sites, and the use of these objects to advance the values of education and enjoyment throughout society.¹³¹ These guidelines call for a heightened level of due diligence when researching a work’s provenance, complete disclosure and dissemination of information regarding an object’s ownership, and conformity with both U.S. laws and the UNESCO Convention of 1970.¹³²

126. *Id.*

127. *Id.*

128. *Id.*

129. ASS’N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (June 4, 2004), available at http://aamd.org/papers/documents/TaskForceReportwithCoverPage_Final.pdf [hereinafter REPORT OF THE AAMD TASK FORCE].

130. ASS’N OF ART MUSEUM DIRS., REPORT OF THE AAMD SUBCOMMITTEE ON INCOMING LOANS OF ARCHAEOLOGICAL MATERIAL AND ANCIENT ART (Feb. 22, 2006), available at http://www.aamd.org/papers/documents/Loans_and_PressRelease.pdf.

131. *Id.*

132. REPORT OF THE AAMD TASK FORCE, *supra* note 129, at 4 (“Since the status of a work of art under foreign law may bear on its legal status under U.S. law, member museums must be familiar with relevant U.S. and foreign laws before making an acquisition.”).

Both Reports also acknowledge the circumstances in which complete provenance of a work of art may not be possible, even after rigorous research. The AAMD recommends that member museums exercise appropriate judgment when faced with these situations. In determining the proper course of action for works of art with incomplete provenance, the member museum may decide to acquire the work if “the work of art is in danger of destruction or deterioration; or the acquisition would make the work of art publicly accessible, providing a singular and material contribution to knowledge, as well as facilitating the reconstruction of its provenance thereby allowing possible claimants to come forward.”¹³³ When considering such acquisitions, the museum should look at the exhibition and publication history of the work, as well as the amount of time the work of art has been outside the country of origin. The AAMD recommends that ten years is sufficient so as to not provide a direct material incentive to looting or illegal excavation.¹³⁴

The nature, values, and goals of the AAMD offer the best evidence that the guidelines set forth in these reports offer the best balance of interests in the issues surrounding the acquisition of stolen cultural objects. The major weakness of these regulatory measures is the scope of the AAMD. First, these reports act only as guidelines. Member museums are merely urged to use these standards when independently determining their own policies and procedures. Second, and more importantly, the AAMD consists of members from only the United States, Mexico, and Canada.¹³⁵ While it currently has 190 active members, including the Getty and the Met, the AAMD does not work towards the interests of European museums or private collectors.¹³⁶ In fact, as of 2006, American art museum purchases of antiquities and archeological material represent ten percent of the global antiquities art trade, which is estimated to equal between \$100 million and \$4 billion per year.¹³⁷ As a market nation threatened with harsh public opinion due to the recent scandals (which is often a costlier consequence

133. *Id.* at 5.

134. *Id.*

135. About AAMD, *supra* note 125.

136. *Id.*

137. Press Release, Ass’n of Art Museum Dirs., Survey Shows Museum Antiquities Purchases are Less than 10% of Global Trade (Feb. 7, 2006), *available at* http://www.aamd.org/newsroom/documents/AAMDAntiquitiesSurveyRelease_FINAL.pdf.

than litigation),¹³⁸ the United States appears to be devoted to combating the illicit trade of stolen art. However, a global effort towards the protection of historical artifacts will be required to fully diminish the availability of illicit art on the black market and the consequential destruction of cultural heritage.

Organizations which work towards the protection of both interests are important forms of self-regulation by reconciling the importation and ownership laws of each nation and the international agreements intended to create a unification of legal understanding. More importantly, they stand for the basic values and goals of spreading cultural knowledge, education, and beauty throughout the diverse cultures of the world. A system which not only protects the heritage of a single group of people, but also understands the value in sharing that culture in the context of another is a practical and vital component to opening international channels of cultural trade while still preserving the cultural heritage of source nations.

B. Art Loss Registries

The policies set forth by the AAMD and other museum organizations are enhanced with the recent development of art loss registries. These registries and databases are invaluable tools as the need for diligent research into a work's provenance grows. In 1976, the International Foundation of Art Research (IFAR) began publishing the "Stolen Art Alert" in an attempt to deter international art thefts.¹³⁹ After ten years, it became apparent that the effectiveness of the database and the volume of claims required computerization to make the registry available to law enforcement agencies worldwide. In 1991, the Art Loss Registry was established in London.¹⁴⁰ The database provides a due diligence service to both buyers and sellers of art which effectively deter criminals from exposing stolen art into the market.¹⁴¹ Since auction houses face similar concerns as museums, and the provenance of many works contain gaps between the years 1933-1948, Sotheby's led the financial sponsorship of the ALR's

138. Felch, *Getty Had Signs*, *supra* note 4.

139. The Art Loss Register, History and Business, <http://www.artloss.com/content/history-and-business> (last visited March 8, 2009).

140. Lucian J. Simmons, *Provenance and Auction Houses*, in RESOL. CULTURAL PROP. DISP. 85, 93 (Int'l Bureau of the Perm. Court of Arb., 2004).

141. *The Art Loss Register*, *supra* note 139.

Holocaust Initiative in 1998 to enable all Holocaust claims to be registered on the ALR database free of charge.¹⁴² More recently, IFAR has received a grant from the Institute of Museum and Library Services (IMLS) for IFAR's Art Law Website Initiative.¹⁴³ The expansion of the site will include International legislation and statutes relating to the ownership and export of cultural property, cultural property contact information for authorities and agencies around the world to whom one should address a question concerning the legality of acquiring an art object, and summaries of case law in IFAR's primary areas of interest – including art forgery, fraud, theft, looting, antiquities issues and World War II-related art ownership claims.¹⁴⁴

C. Arbitration

While self-regulation and international agreements provide frameworks for cooperation between source and market nations in order to reduce the incentive and ability for pillage and illicit export, there is no real effective mechanism of international dispute resolution. The legal discussions above are meant to protect the objects from being removed, but illicit art trade across national borders will always exist and the question arises as to what should be done once the ownership of a work is disputed. Furthermore, the interests and principles inherent in the protection of the objects as cultural property should be upheld when discussing the restitution of the objects and compensation of good faith purchasers. Arbitration is an important solution to be considered. The 1995 UNIDROIT Convention states "parties may agree to submit disputes to any court or other competent authority or to arbitration."¹⁴⁵ Arbitration may help to address the common issues arising in cultural property disputes such as prohibitive limitation periods and evidentiary standards, as well as claims of good faith purchases.¹⁴⁶ The drafters of the Convention were unanimous in recognizing that arbitration favors "the respect of

142. Simmons, *supra* note 140, at 93.

143. *Id.*

144. International Foundation for Art Research, IFAR Receives IMLS Grant for Art Law Website Initiative (Dec. 2004), http://www.ifar.org/news_article.php?docid=1188177017.

145. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 10, at art. 8 (emphasis added).

146. Tjaco T. Van den Hout, *Introduction*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES, at xiii, 3 (Int'l Bureau, Perm. Court of Arb. ed., 2003).

confidentiality,” and that there would be “no problem regarding enforcement since recourse to arbitration is dependent on the consent of the two parties and in particular of that of the person claiming restitution.”¹⁴⁷ Furthermore, since states are often in disputes involving violations of export regulations, illegal excavations, or theft, the use of arbitration could also help to “facilitate resolution of the problem [of state immunity].”¹⁴⁸

Additional interests addressed by scholars who seem to favor a departure from adjudicative proceedings, which seem to be inherent in the art market include confidentiality, close personal relations, and reliance on a body of ethics, guidelines, conventions, and codes rather than black-letter law.¹⁴⁹ Art disputes can create disparate results across jurisdictions, especially considering the unique status afforded to cultural property in international law. Considering these claims invariably span across borders and time, and the variety of treatment of stolen goods under various national regimes, arbitration under the Permanent Court of Arbitration may be the most suitable forum since it is composed of member states and is uniquely equipped with a depth of experience in state-to-state disputes.¹⁵⁰

D. Arguments Against Restitution

A major concern of American museums involves the possible restitution of important works which have been part of their collection for many years and were illicitly obtained prior to the international agreements on cultural property. The arguments are inherent with the ideals of cultural internationalism. For instance, the AAMD guidelines set forth good practice with respect to prior acquisitions:

147. Int'l Inst. for the Unification of Private Law, *Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, Explanatory Report, ¶ 82, Unidroit 1990-Study LXX-Doc. 19 (Aug. 1990).

148. DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS: ACTS AND PROCEEDINGS 230 (Int'l Inst. for the Unification of Private Law ed., 1996).

149. Norman Palmer, *Litigation: The Best Remedy?*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 265 (Int'l Bureau of the Permanent Court of Arb. ed., Aspen Publishers 2003).

150. Owen C. Pell, *Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 307 (Int'l Bureau of the Perm. Court of Arbitration ed., Aspen Publishers 2003).

AAMD recognizes that some works of art for which provenance information is incomplete or unobtainable may deserve to be publicly displayed, preserved, studied, and published because of their rarity, importance, and aesthetic merit. AAMD affirms that art museums have an obligation with respect to such works of art, which in the absence of any breach of law or of these Principles may in some cases be acquired and made accessible not only to the public and to scholars but to potential claimants as well If a member museum gains information that establishes another party's claim to a work of art acquired after the date of this Report, even though this claim may not be enforceable under U.S. law, the museum should seek an equitable resolution with the other party. Possible options that should be considered include: transfer or sale of the work of art to the claimant; payment to the claimant; loan or exchange of the work of art; or retention of the work of art.¹⁵¹

Not only do these guidelines suggest a preference to adhere to scientific, ethical, and professional principles, they also suggest the importance within those principles to retain the works based on their significance within the museum itself.¹⁵²

Additional examples of retentionist ideals can be seen in various relevant declarations. For example, the Declaration on the Importance and Values of Universal Museums was signed by the directors of eighteen United States and Western European museums and states that "we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source."¹⁵³ These statements seem to mirror the passionate appeals made by the Greek cultural minister in her pleas to the British Museum regarding the Elgin Marbles.

These arguments must be examined in relation to the predominant interests the museums are seeking to protect. In fact, a predominant interest of source nations is protection of the objects themselves.¹⁵⁴ The ideas of retention and protection are often considered to be synonymous. However, they are distinct

151. REPORT OF THE AAMD TASK FORCE, *supra* note 129, at 2, 7.

152. Boyd, *supra* note 1, at 55.

153. Peter-Klaus Shuster, *The Treasures of World Culture in the Public Museum*, 57 ICOM NEWS No.1 at 4 (2004).

154. John Henry Merryman, Two Ways of Thinking About Cultural Property, 80 AM. J. INT'L. L. 831 (1986).

ideas when discussing whether retention schemes effectively protect the objects.¹⁵⁵ It is easy to see that in many cases, the return of works to the source nation or retention of the artifacts within the source nation through export bans may endanger the integrity of the work which would be more adequately cared for abroad.¹⁵⁶ Therefore, one could reasonably argue that if a source nation does not have the means to adequately invest in the conservation of its cultural property, then it must have different motives for retention.¹⁵⁷ A source nation which is truly motivated by a concern for protection would open the international trade of its cultural property to those nations who are prepared to care for them until they can be safely returned.¹⁵⁸

A final unfavorable consequence to the retentionist policies of source nations when enacting total export controls is the creation of a black market.¹⁵⁹ There is ample evidence that retentive laws have not effectively limited the trade in cultural property, but have merely determined the form the traffic takes and the routes it follows.¹⁶⁰ As discussed above, the process of looting and clandestine excavations is harmful to artifacts, once again diverging from source nations' primary concern for the protection of the objects. In other words, as long as there is a demand for cultural property, an illicit traffic will exist.

D. Art, Morality, and the Law

When applying the legal and ethical standard put forth in this discussion, it is clear to see that the treatment of each work must be determined on a case by case basis depending on the circumstances. Issues of protection (both cultural and physical), morality, and legality play roles which suggest that the agreement reached between the Getty museum and the Italian government conform to the ideals of these standards and principles, while the return of the Elgin Marbles may create more difficult issues which are not so easily solved. In the case of the Elgin Marbles,

155. John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 506 (1988) [hereinafter Merryman, *The Retention of Cultural Property*].

156. Edward Schumacher, *Peru's Rich Antiquities Crumbling in Museums*, N.Y. TIMES, Aug. 15, 1983, at C14.

157. Merryman, *The Retention of Cultural Property*, *supra* note 155, at 507.

158. *Id.* at 507-08.

159. *Id.* at 508.

160. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L.R. 275, 306-07 (1982) (describing "Ten easy lessons on how to create a black market").

interesting legal issues arise when also looking at the laws of the possessing nation. In the 2005 case in England involving the return of the marbles to Greece, the judge found that restitution of the marbles to Greece would in fact violate the British Museum Act¹⁶¹ which allows the trustees of the museum to otherwise dispose of works within the museum only under certain circumstances.¹⁶² The multitude of varying legal and ethical standards makes it clear that a single answer will never be easy to resolve disputes involving cultural property.

E. The Getty Settlement

The settlement agreement reached between the Getty Museum and the Italian government represents a successful end to a very public example of illicit art dealings. However, the museum was unable to find any protection as a bona fide purchaser after the discovery of convincing evidence that former museum directors knew of the artifacts' illicit nature.¹⁶³ The avoidance of civil liability against the museum through long negotiations provides insight into the trend of a liberal exchange between source nations and U.S. museums.¹⁶⁴ As part of the deal, the Aphrodite statue, included in the forty illegally acquired works and a masterpiece of the Getty Villa, will not be returned to Italy until 2010.¹⁶⁵ However, the Getty's actions will still have a damaging effect on the museum's collection and standing within the community.¹⁶⁶ Some believe that the Getty deal has accomplished what Italy had started a decade ago: reduce the market for illicit antiquities by attacking both the supply and demand.¹⁶⁷

The settlement and return of the works indicates a trend in the American art museum community of adherence to internal policies that are meant to protect the cultural property of source nations from looting and illegal export. In 2006, the Metropolitan Museum in New York settled a dispute with the Italian

161. *Attorney General v. Trustees of the British Museum (Commission for Looted Art in Europe intervening)* [2005] EWHC 1089 (Ch.), [2005] 3 W.L.R. 396 (U.K.).

162. British Museum Act, 1963, c. 24, § 5 (Eng.).

163. Felch, *Getty to Give 40 Antiquities*, *supra* note 5.

164. See Siehr, *supra* note 104.

165. Felch, *Getty to Give 40 Antiquities*, *supra* note 5.

166. *Id.*

167. *Id.*

government to return stolen objects from the museum's Greek and Roman Art galleries that had been looted by Italian tomb robbers.¹⁶⁸ The aforementioned Getty agreement is similar in that both museums will be allowed to retain some of the works before actually returning them to the source nation.

The settlement with the Met sparked an aggressive pursuit by the Italian government to recover its stolen patrimony. The accord ushered in a new era of heightened scrupulousness in collecting, now that museums know they are in the legal cross hairs.¹⁶⁹ This era, along with the discovery of new evidence,¹⁷⁰ not only created a working model for resolving these disputes, but has also put the Italian government in a more powerful position to demand the return of its cultural property. Italy has also approached other museums, including Boston's Museum of Fine Arts. Other countries, such as Egypt, Turkey, Greece and Peru, have subsequently been emboldened to demand repatriation of their disputed antiquities.¹⁷¹

F. The Future Status of Museum Collections

With U.S. museums experiencing greater scrutiny from the global art market, the need for greater adherence to industry standards and guidelines for the collecting of antiquities from source nations is becoming more important. The settlements made between these museums and the Italian government indicate a trend towards the amicable return of stolen art works amidst a general goal of sharing cultural property with the peoples of the world. These settlements offer an ideal resolution since they encourage the values of industry regulating organizations whose ultimate goals are to protect the cultural patrimony of source nations by stifling the growth of the illicit international art market.¹⁷²

The recent raids on four Southern California museums, spurred by an investigation into the looted Ban Chiang artifacts, could have wide-spread implications. The treatment of this vast

168. Maria Puente, *Stolen Art Met with Public Yawn*, USA TODAY, Mar. 29, 2006, at A1.

169. *Id.*

170. Felch, *Getty Had Signs*, *supra* note 4 (describing the discovery of thousands of Polaroids of looted artifacts).

171. Puente, *supra* note 168.

172. About AAMD, *supra* note 125.

group of material is sure to shape the greater understanding needed for this issue.¹⁷³ In essence, every piece of Ban Chiang material in the United States could potentially be considered stolen under American law. Among the many American museums with Ban Chiang artifacts are the Metropolitan Museum of Art in New York, the Freer and Sackler Galleries in Washington, the Museum of Fine Arts, Boston; the Cleveland Museum of Art; the Minneapolis Institute of Arts; and the Asian Art Museum in San Francisco.¹⁷⁴ After the searches were conducted, Peter Keller, the director of the Bowers Museum, said in an interview that, although the museum has extensive collections of Ban Chiang materials, "We honestly did not know this material was illegal."¹⁷⁵ While ignorance of the law is no defense, it does bring up the complex issues faced by museum officials and the need for a more comprehensive and less burdensome system of provenance investigation. A museum must not only understand the international agreements in place and the foreign patrimony laws of each source nation, but they must also know the nuances of U.S. laws and which foreign and international laws the U.S. is committed to enforce.¹⁷⁶

Despite these problems, there is a clear trend which coincides with the moral topics discussed above and throughout this comment. Museums are becoming increasingly sensitive to these topics of concern. After the investigation in California, many museum curators now say they would not accept any Ban Chiang materials, even if offered by their most prestigious donors.¹⁷⁷ In fact, Robert Jacobsen, chairman of the Asian art department at the Minneapolis Institute of Arts explains that they would turn down the donations, not just because of the investigation, "but because times have changed. There is a moral basis here."¹⁷⁸ The hesitations of museums are also understandable when considering

173. See generally Finkel, *supra* note 37.

174. *Id.* (quoting Forrest McGill, chief curator at the Asian Art Museum, who said, "I believe that virtually every big American art museum that collects Asian art has some Ban Chiang material.").

175. Wyatt, *Museum Workers Are Called*, *supra* note 36, at B13.

176. Finkel, *supra* note 37 (quoting Mr. McGill, "It's not as easy as you would think to be up to date and conversant with different countries' laws and to know which foreign laws the U.S. is committed to enforcing and which not.").

177. *Id.*

178. *Id.*

the complexity of interwoven legal frameworks which must be checked and researched thoroughly before any acquisitions are made. When past acquisitions are found to have been illegally exported from their source nation, museums express a sort of moral apathy for the repatriation of cultural objects, along with a reluctance to surrender the valued objects without some legislation compelling them to do so.¹⁷⁹ These reactions, along with the recent settlement agreements reached by major museums like the Met and the Getty, indicate the importance of strengthening self-governing structures based on evolving moral considerations within the art world by solidifying the existing international legal framework in order to reach a system of balanced interests through the spread of cultural learning.

VI. CONCLUSION

Perhaps the recent cases of stolen cultural objects found in major U.S. museums will in fact heighten the standards of world museums, thereby eliminating the demand for illicitly acquired artifacts. The threats of litigation created by U.S. and foreign law, combined with international conventions and associations, will hopefully foster open negotiations between museums and source nations, creating more efficient systems of exchange and amicable restitution based on moral compromises and understandings.

At the time this comment was completed, the shadow already hovering over Southern California museums has darkened. The former Director of Antiquities at the Getty, Marion True, continues to await her trial in Italian courts. The investigation into the Markells' dealings with the California museums will continue to unfold. Future developments concerning the Ban Chiang artifacts and the effects of these discoveries on the treatment of cultural objects may surprise some, may conform to the art and legal world's predictions, and may even change the way these worlds treat this subject. In any event, a greater examination of current trends of dispute settlement is required, using self-governing codes of ethics that reflect the protection of source nation cultural heritage and of the physical objects themselves as

179. *Id.* (quoting Robert Jacobsen, chairman of Asian art department at the Minneapolis Institute of Art. When asked whether his museum would consider repatriation, Mr. Jacobsen said: "When we acquired or were given these works, and I think I speak for all museums here, we did not think of them as illegal. But if it comes to pass that legislation declares this material illegal, we would simply return it.").

guides for strengthening and enforcing international agreements to reflect these values.

The Ban Chiang works are far less valuable than those discovered in the Getty scandal, but they are far greater in number, and the alleged actions of collectors and museum officials all over Southern California is equally troubling. The works can be traced to parts of Asian countries rich with cultural heritage and protected with strict export laws, allowing prosecutors to pursue claims based on violations of the NSPA and other U.S. laws protecting cultural property.¹⁸⁰

The extent of this investigation continues to unravel as this comment is written and additional occurrences of stolen antiquities in the United States are continually exposed.¹⁸¹ One thing is clear though, the amicable resolution and return of art work by the Getty Museum will not stop the bleeding until a more universal understanding concerning the treatment of cultural property is reached.

It should also be clear that any dialogue concerning international cultural property must treat the problem as one that is complex and multi-dimensional.¹⁸² The conclusion of the Getty case lends support to source nation laws and policies. A discussion of the Elgin Marbles, Ban Chiang artifacts, or countless other works found in museums across the globe, however, require separate considerations and individual discussions of the varying values and principles in each circumstance. While protection of the

180. Felch, *Raids Suggest a Deeper Network*, *supra* note 13 (describing the source of the contested objects: "Many come from the ancient civilization of the Ban Chiang, which occupied northeastern Thailand from 1000 BC to AD 200. 'The original location where Ban Chiang culture was discovered was named a World Heritage Site in 1992 and is considered the most important prehistoric settlement yet discovered in Southeast Asia,' the warrants say. The warrants allege that the Ban Chiang objects are probably looted because they were first excavated by archeologists in 1967, six years after Thailand banned the export of antiquities. The Thai government never gave permission for the contested antiquities to leave the country. Moreover, importing such objects into the United States after 1979 was a violation of the U.S. National Stolen Property Act and the Archeological Resource Protection Act, the warrants state. Other objects named in the warrants came from Burma (also known as Myanmar), from which the U.S. has banned imports since 2003, and China, which has strict export laws governing its antiquities. There are also objects allegedly stolen from Native American sites in the U.S., the sale of which are controlled by federal law.").

181. Mike Boehm & Jason Felch, *Federal Probe of Stolen Art Goes National; Chicago Man's Private Collection was Raided in Investigation of Cerritos Art Dealer Accused of Smuggling*, L.A. TIMES, Jan. 29, 2008, at B1.

182. Merryman, *A Licit International Trade in Cultural Objects*, *supra* note 42.

objects and the heritage they represent is important, the source nations are not the only interested parties. In fact, market nations are vital in the dissemination of those cultural values throughout the world. This is achieved today, not through motives of imperialism, but in an effort to educate and cultivate the world through the far-reaching exposure of artistic and cultural expression.